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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SAVAGE ENTERPRISES, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-164 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER involves an appeal by Savage Enterprises, Inc. ("Savage") of the Puget Sound Air Pollution Control Agency's ("PSAPCA") June 4, 1987 Notice and Order of Violation No. 6693 for alleged violations of Regulation I, Sections 10.03, 10.04(b), 10.05, and WAC 173-400-075 in the handling of asbestos materials on April 1, 1987 in Seattle, Washington.

The formal hearing was held on February 1, 1988 in Seattle, Washington. Board members present were Judith A. Bendor (Presiding), Wick Dufford (Chairman) and Lawrence J. Faulk. Appellant Savage was represented by Douglas W. Elston, Attorney with Ulin, Dann, Elston & Lambe.

S. F. No. 5978—OS—8-87.

PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin & McGoffin. Court Reporter Pamela J. Brophy of Gene Barker & Associates recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. Appellant filed a brief on January 28, 1988. From the foregoing, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency is an activated air pollution control authority under the terms of the State of Washington Clean Air Act. PSAPCA has filed with the Board certified copies of its Regulation I of which the Board takes official notice.

II

Savage Enterprises, Inc.'s place of business is in Seattle, Washington. It specializes in asbestos-removal work. It was hired by Coppage Realty to remove asbestos insulation from a building located at 4700 - 4704 11th Avenue NE, a/k/a 1104 NE 47th Street, and from some pipes at 4706 1/2 11th Avenue NE in Seattle, Washington.

Coppage Realty was not named in PSAPCA's Notice and Order and is not a party to this appeal.

III

The Notice and Order of Civil Penalty alleges that Savage violated WAC 173-400-075 and Sections 10.03(a) and (b), 10.04(b)(2)(iii)(A), (B) and (C), and 10.05(b)(1)(i) and (iv) of Regulation I on or about

April 1, 1987, at 1104 NE 47th (a/k/a/ 4700 - 4704, 11th NE) in Seattle, Washington by failing to provide written notice of intent to remove asbestos, and failing to perform requirements designed to prevent asbestos fibers from escaping to the air between removal and ultimate disposal. A $1,000 penalty was assessed.

IV

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is one of only eight pollutants classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous Air Pollutants (NESHAPS). It is a substance which by Federal Clean Air Act definition:

> causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness. Section 112.

Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18, 1987).

V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10. PSAPCA's regulations govern work practices.

VI

The PSAPCA notification requirements (Regulation I, Section 10.03) are an integral part of the Regulations, designed to give the Authority advance notice of the removal operation, so that inspections can be made and the public's safety protected with an ample margin of safety.

An asbestos contractor has a responsibility to file the notice, providing the requisite information, including the address and description of the property, the amount of asbestos to be removed, the starting and completion dates of the removal project, and so forth, and to pay the appropriate fee.

VII

In this case there are three Seattle buildings owned by Coppage Realty that need to be mentioned. The building on the corner of 11th Avenue and NE 47th has two stories. The first floor's address is 1104 NE 47th; the second floor is numbered 4700 to 4704 11th NE. Adjacent to this building was another building also numbered 4706 11th NE; in back of this building was a small cottage numbered 4706 1/2 11th NE. Savage did asbestos removal work at 1104 NE 47th in the first floor furnace room, and also at 4706 1/2 11th NE in the cottage. The removal work in the cottage is not the subject of the Notice and Order of Penalty or of this appeal.

VIII

On March 11, 1987, James Walsh, President of Savage Enterprises,

Inc., filed with PSAPCA a Notice of Intent to remove 6 linear feet of asbestos from 4706 1/2 11th Avenue NE in Seattle. The minimum fee of $25, based on the amount to be removed, was enclosed. In the application the building was listed as a cottage. There was no statement on the form that any removal would occur at any other address or other building.

No notification for asbestos removal at 1104 NE 47th was received by PSAPCA, and we conclude that none was filed. We find unconvincing appellant's contention to the contrary; such contentions were not based on first-hand knowledge, but rather were based on general statements about the company's customary practices. Moreover, no documentary evidence, such as a conformed copy of the allegedly filed notice or a cancelled check for the fee were offered.

IX

On April 1, 1987, at Coppage Realty's request, an inspector for PSAPCA inspected 1104 NE 47th. Coppage had informed PSAPCA that it would be demolishing the building. Pre-demolition inspections are advisable because PSAPCA regulations proscribe demolition of buildings containing asbestos unless the asbestos is encased in concrete or other material. Regulation I, Section 10.04(a).

In the furnace room, the inspector found empty bags for asbestos, and dry and friable material which appeared to be asbestos. No asbestos removal work appeared to be in progress. No asbestos removal

equipment was seen, nor any signs warning of removal operations, nor any internal containment barriers.

Samples of the material were taken as follows:

Sample #1 from the floor near the furnace below a hole where a chimney pipe had been;

" #2 in the hole for the pipe;

" #3 around a pipe joint leading from the furnace; and

" #4 on the ceiling.

The samples were labeled and the inspector prepared a chain of custody for each sample. The samples were delivered to the Department of Ecology (DOE) laboratory in Manchester, Kitsap County.

X

The DOE laboratory has recently been certified by the U.S.A. Environmental Protection Agency (EPA) to do asbestos analysis tests. Prior to this federal certification process, in November 1986, the laboratory had successfully passed the EPA "Round Robin" procedure, whereby EPA provided samples to the laboratory for analysis. The laboratory's analytic results were then compared to other laboratories throughout the nation and found to be acceptable.

The asbestos tests DOE performs are nationally accepted tests, ones also widely accepted in the scientific community. The tests involve the use of polarized light microscopy by which the presence of asbestos in a sample can be objectively determined. The percentage by volume of asbestos material present is derived by visual observation

and estimation using a stereoscope, through which the distinctive features of asbestos fibers can be seen. This subjective aspect of the process is spot-checked by a second person who looks at one out of five samples each analyst tests. The DOE laboratory technician who performed the analyses on the four samples had training and experience in analyzing materials for asbestos. About one half of her time on the job is devoted to asbestos identification. Her overall volumetric calculations have been within 5% of the second check.

The volumetric results of these 4 specimens were:

Sample #1 contained 35% asbestos
" #2 " 60% "
" #3 " 60% " (55 % chrysotile/5% amosite)
" #4 " 90-95% "

The samples sent in for analyses, in this and other cases, are large enough for numerous retests to be performed on material left over after the initial analysis.

The remainder of the samples are typically kept by DOE for one year at the laboratory, and then archived for several more years. There is no evidence that appellant Savage ever attempted to obtain a specimen from the four samples.

XI

Evidence was presented by PSAPCA Air Pollution Source Analyst Fred L. Austin that asbestos by volume can be converted to asbestos by

weight on a basically 1:1 ratio. The ratio can vary somewhat, depending upon the materials' specific gravity and density, but the 1 for 1 conversion is typically used throughout the United States.

Based on the foregoing conversion factors, all four samples tested far in excess of the 1% asbestos criteria of Regulation I, Section 10.02.

XII

Savage employees began work at 1104 NE 47th on the morning of March 23, 1987, and returned the keys of the building to Coppage Realty later that same day. Air sampling of the work area was performed by another company on March 24, 1987. Savage sent an invoice to Coppage, billing the latter for performance of the contract, which was received on March 31, 1987.

We find that by April 1, 1987, when PSAPCA inspected, Savage had completed its removal and disposal operations.

XIII

Savage's bid for the job at "4704 11th Avenue NE" proposed "to properly dispose of "all asbestos containing furnace and pipe insulation at the reference address." Coppage's response was phrased more broadly, accepting the bid "for the removal of <u>all asbestos material</u> located within that certain building located at 4700 - 4704 11th Avenue NE A/K/A 1104 NE 47th Street." (Emphasis added). The acceptance called for inspection by a separate company after the work and a report "stating that all asbestos has been removed."

Nothing in the record shows that Savage ever told Coppage that it believed the acceptance varied the offer. Nonetheless, Savage points out the passage of time between job completion and PSAPCA's inspection, suggesting intervening action by others. There is no evidence that any entity other than Savage was involved in asbestos removal at the site, either before or after Savage performed its work there.

Under the facts and circumstances, it is more probable than not that that the asbestos fragments found on the furnace room floor at the job site were the result of Savage's work.

XIV

We take judicial notice of our prior decisions in Savage Enterprises, Inc. v. PSAPCA, PCHB No. 86-101 (1987), Kent School District No. 415 and Savage Enterprises, Inc. v. PSAPCA, PCHB Nos. 86-190 and 86-195 (1987), and Savage Enterprises, Inc. and Northshore School District #417 v. PSAPCA, PCHB No. 86-179 (1988). In all three of these cases asserted violations of PSAPCA's asbestos regulation were sustained.

XV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties. Chapter 43.21B RCW. The case arises under PSAPCA regulations implementing the Washington Clean Air Act, Chapter 70.94 RCW.

II

Notice and Order of Civil Penalty No. 6693, dated June 4, 1987, reads, in pertinent part, as follows:

> On or about the 1st day of April, 1987, in King County, State of Washington, you violated WAC 173-400-075 and Article 10 of Regulation I by causing or allowing the removal or encapsulation of asbestos materials at 1104 N.E. 47th (aka 4700-4704 11th N.E.), Seattle, Washington, and failing to comply with the following sections of Article 10 of Regulation I:
>
> 1. Section 10.03(a) & (b) of Regulation I: Failure to file with the Air Pollution Control Officer, written notice of intention to remove or encapsulate asbestos materials, accompanied by the appropriate fee and including the scheduled starting and completion dates of the asbestos removal or encapsulation --- Notice of Violation No. 021960.
>
> 2. Section 10.04(b)(2)(iii)(A) of Regulation I: Failure to adequately wet asbestos materials that have been removed or stripped and to ensure that they remain wet until collected for disposal --- Notice of Violation No. 021961.
>
> 3. Section 10.04(b)(2)(iii)(B) of Regulation I: Failure to collect asbestos materials that have been removed or stripped for disposal at the end of each working day --- Notice of Violation No. 021961.
>
> 4. Section 10.04(b)(2)(iii)(C) of Regulation I: Failure to contain asbestos materials that have been removed or stripped in a controlled area at all times until transported for disposal --- Notice of Violation No. 021961.

5. Section 10.05(b)(1)(i) of Regulation I: Failure to treat all asbestos-containing waste materials with water during collection, processing, packaging, transporting or deposition of any asbestos-containing waste material --- Notice of Violation No. 021962.

6. Section 10.05(b)(1)(iv) of Regulation I: Failure to treat all asbsestos-containing waste material with water and, after wetting, seal in leak-tight containers, while wet --- Notice of Violation No. 021962.

III

A critical avowed purpose of the Washington Clean Air Act and implementating regulations, including Regulation I, is to prevent release of asbestos fibers, a hazardous material, into the air. Whenever asbestos is or may be emitted into the atmosphere, the "harmful potential" test set forth in Kaiser Aluminum v. PCHB, 33 Wn. App. 352, 654 P.2d 723 (1982), is met. PSAPCA's work rules validly seek to prevent that harmful potential. Alpine Builders, Inc. & Tacoma School District No. 10 v. PSAPCA, PCHB Nos. 86-183 & 86-192 (Nov. 10, 1987). Therefore appellant's challenge to the lawfulness of applying PSAPCA's regulations to asbestos removal conducted inside the building is without merit.

IV

We conclude that the Notice and Order of Civil Penalty fails to describe the violation of WAC 173-400-075 with "reasonable particularity", as required by RCW 70.94.431. The mere recitation of the section number is insufficient to provide any idea of the content

of the federal regulations incorporated by reference therein, or of the specific portion of those regulations alleged to have been violated. Savage Enterprises, Inc. v. PSAPCA, PCHB No. 86-101 (April 17, 1987).

However, we conclude the Notice and Order of Civil Penalty was of sufficient particularity to provide adequate notice to appellant as to the violations of Article 10 of PSAPCA's Regulation I. It recited the date and location of the violation, and described the content of the specific Regulation I sections alleged to be violated. In addition, during the six-months pendency of this appeal, Savage had available the full range of civil discovery to further clarify the legal contours. Chpt. 371-08 WAC. Appellant failed to avail itself of these litigation tools. It cannot be now heard to complain. See, Marysville v. PSAPCA, 104 Wn.2d 115, 702 P.2d 469 (1985).

V

Appellant Savage concedes that it removed asbestos from 1104 NE 47th. We conclude that Savage did violate Regulation I, Section 10.03 by failing to file with PSAPCA a Notice of Intent to Remove Asbestos from that location. Appellant's mere argument that they provided notice, was unsupported by any documentary evidence, or by direct knowledge.

VI

We conclude that PSAPCA has demonstrated that the testing procedure which leads to the preparation of Asbestos Analysis Reports

by DOE's laboratory is a generally accepted test, the results of which, within a range of 5% as to the percentage of asbestos, can be regarded as factual and not the expression of opinion.

Accordingly, we decide that we can admit the test results in future cases as meeting the public records exception to the hearsay rule. See, RCW 5.44.040. Kaye v. State Department of Licensing, 34 Wn. App. 132, 659 P.2d 548 (1983). Based on the record made here, we announce that we will in the future depart from the approach taken in Alpine Builders, Inc. and Tacoma School District No. 10, supra, on this point.

Moreover, we were convinced that using a 1 to 1 conversion ratio for translating the percentage by volume of asbestos observed in the laboratory into the percentage by weight of asbestos is generally accepted and appropriate in evaluating cases under PSAPCA's regulations. We will, therefore in future cases take judicial notice of this conversion ratio, recognizing of course that what is being converted is subject to around a 5% error. Thus, the showing we held to be lacking in Long Services Corporation v. PSAPCA, PCHB No. 86-191 (Nov. 10, 1987), has now been made and the failure to prove the conversion ratio will no longer serve as grounds for reversal.

VII

We conclude that the material analyzed by the DOE was "asbestos material" as that term is defined by Section 10.02(e) of Regulation I:

> "Asbestos material" means any material containing at least one percent (1%) asbestos by weight, unless it can be demonstrated that the material does not release asbestos fibers when crumbled, pulverized or otherwise disturbed.

Savage made no showing that the asbestos material found on the furnace room floor was not friable.

VIII

The term "asbestos removal" is defined in Regulation I, Section 10.02(f), as follows:

> "Asbestos removal" means to take out asbestos materials from any facility and includes the stripping of any asbestos materials from the surface of or components of a facility.

Section 10.04(b)(2)(iii), under which appellant is cited, relates to "asbestos materials that have been removed or stripped." Savage argues that the samples taken from material still on pipes or wall surfaces cannot be the basis for violations of that subsection.

We do not need to decide here whether fragments still adhering to facility surfaces after a stripping operation can be the basis for violation of Section 10.04(b)(2)(iii). In this case, fragments were left on the furnace room floor after stripping and as a result of removal from facility components. The materials found on the floor evidenced violations as follows: 1) they were not kept wet until placed in a leak-tight container; 2) they were not collected for disposal at the end of each working day; 3) they were not kept in an

area to which only certified asbsestos workers had access until transported to a waste disposal site. Section 10.04(b)(2)(iii)(A),(B), and (C). See Sections 10.02(h) and (i).

IX

Section 10.04 deals with asbestos removal, from the stripping process through the sealing of discarded material in leak-tight bags safely ready for transport. Section 10.05 deals with the disposal process and makes reference to the "collection, processing, packaging, transporting or deposition of any asbestos-containing material." The two sections overlap to some degree.

Here the discovery of dry friable asbestos on the furnace room floor after both the removal and disposal phases were complete is enough to demonstrate noncompliance under either Section 10.04 or 10.05. However, we have, consistently refused to find violations of both sections when a single act or omission was involved. Ballard Construction Co. v. PSAPCA, PCHB No. 87-37 (March 17, 1988).

We adhere to that approach here. We conclude that the three cited aspects of Section 10.04 were violated during removal, and we decline to find separate violations of Section 10.05.

X

The purpose of civil penalties is to promote future compliance with the law. AK-WA, Inc. v. PSAPCA, PCHB No. 86-111 (Feb. 13, 1987). The failure to provide notice to PSAPCA is a violation of

heightened concern. Without such notice, PSAPCA would be severely impeded from performing its statutory enforcement responsibilities. Given the dual notice and failure to properly remove violations, and in light of Savage's past history of violations, we conclude the $1,000 penalty is merited.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions the Board enters the following

ORDER

Notice and Order of Civil Penalty No. 6693 is AFFIRMED.

DONE this 28th day of March, 1988.

POLLUTION CONTROL HEARINGS BOARD

Judith A Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Lawrence J. Faulk 3/25/88
LAWRENCE J. FAULK, Member

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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DAVID and MAXINE MORRIS, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-173 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER, the appeal of a Notice of State Regulation (posting) under the Water Code came on for hearing before the Board on November 9, 1987, in Yakima, Washington. Sitting as the Board were Wick Dufford, presiding, and Lawrence J. Faulk. Pursuant to the request of respondent Department, RCW 43.21B.230, the hearing was a formal one. Pat Adams of Adkins and Associates reported the proceedings.

Appellants were represented by David Morris, appearing pro se. Respondent was represented by Peter R. Anderson, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I.

The Department of Ecology (DOE) is a regulatory agency of the State of Washington with authority to administer and enforce the water resource laws of the state.

II.

Appellants Morris reside on an acreage in Yakima County on the south side of the Moxee Valley in what is known as the Black Rock area.

III.

The Morrises bought their property in 1973 and have been gradually developing it ever since. In 1975 and early 1976, a lawn, a garden and a small orchard were put in. In 1980 additional land was planted in alfalfa. In all, about seven and one-half acres were put into irrigated cultivation, with a well on the property as the water source.

IV.

In early 1985, the Morrises irrigation came to the attention of DOE. The agency advised, orally and in writing, that a permit is required to irrigate in excess of 1/2 acre of noncommercial lawn and garden.

The agency further informed the Morrises that their property is within the Black Rock study area where no new permits are being issued pending completion of a study of the adequacy of the ground water supply.

V.

In response to DOE, the Morrises ceased irrigating about half of the acreage being irrigated and applied for a permit to irrigate the rest. However, irrigation of more than 1/2 acre continued.

VI.

On June 23, 1987, upon a visit to the Morris' property, two DOE inspectors confirmed that more than 1/2 acre was being irrigated. At that time they posted the Morris' well and gave Mr. Morris a Notice of State regulation ordering him to cease withdrawal of groundwaters in excess of 5000 gallons per day or in excess of 1/2 acres.

VII.

The Morrises possess no permits or certificates authorizing their water use and have on file no timely claim to a right pre-dating the groundwater statute. Their only filing of record with DOE is the permit application they submitted in 1985. No action has been taken by the agency on the application.

VIII.

Since the late 1960's concerns have been voiced about declining groundwater levels in the Black Rock area of the Moxee Valley.

Efforts to assess the problem were unsuccessfully made in the 1970's. Finally in 1983 DOE commissioned a thorough study of the matter, encompassing a geographic area of about 100 square miles. The study area extends east and west along the valley and reaches north and south to the valley rims - Yakima Ridge and Rattlesnake Ridge respectively.

Adequate reliable information on the water bearing zones in the area has proven difficult to obtain and the study, as of today, has not been completed.

IX.

In recent years, declines of between 8 and 10 feet a year have been experienced in study area groundwater levels. The source of groundwater recharge is solely precipitation, and the region is an arid one, receiving in the neighborhood of 10 inches of precipitation a year.

At present, the total of water filings in the area is composed of one-third certificates, one-third permits and one-third applications. Assuming that not all the permitted appropriations have been perfected, there is cause for concern that the water mining situation will get worse.

X.

The Morris' property is somewhat isolated, separated from the valley proper by a knoll and elevated slightly above the valley

floor. Behind it the land rises steeply. The surrounding landscape is treeless, covered with sage and dry grasses. The Morrises worry about fire.

In 1978, a range fire swept over the ridge and came close to burning them out. Fire fighters were able to stop the blaze just short of the Morris place.

XI.

At present the Morrises are irrigating about one and a quarter acres, as follows: 0.65 acre - orchard; 0.10 acre - garden;; 0.50 acre - lawn. They would like to be able to continue irrigating this area in order to grow food for their private needs and to provide some greenery to serve as a fire break.

XII.

With their current state of knowledge, the DOE is unable at present to conclude that groundwater is available to the Morrises for withdrawal (in excess of 1/2 acre) without impairing existing rights.

In addition to the permits and certificates already issued for withdrawals in the study area, there are numerous applicants for permits with priority dates earlier than the Morrises. Some of these applicants are asking for large amounts of water. Were the agency obliged to rule on the Morris application today, it would have to deny it.

XIII.

Mr. Morris has alleged that he was told in 1976 by an employee of DOE that no permit was needed to carry on the irrigation he was conducting (then about two acres).

The employee in question is now dead. However, he was one of the most seasoned water resource workers in the State, with years of experience in administering the ground water statute. Moreover, his job was as a field investigator. He had no authority either to issue permits or to speak for the agency about such decisions.

XIV.

Any Conclusion of Law which is deemed a Finding of Fact is adopted as such.

From these Facts the Board comes to these

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over these persons and these matters. Chapters 90.03, 90.44 and 43.21B RCW.

II.

The groundwater statute, chapter 90.44 RCW, supplements the Water Code of 1917 and incorporates its terms. RCW 90.44.020. Under these laws, the only way a right to use water may be acquired modernly is through the permit system administered by DOE. RCW 90.44.050, RCW 90.03.010.

The sole exception to the permit requirement relates to small groundwater withdrawals. The statute specifies the limits of the exception. It applies to withdrawals of less than 5000 gallons per day and the irrigation of less than 1/2 acre of noncommercial lawn and garden. RCW 90.44.050.

III.

The Morrises have violated the water laws by irrigating more than 1/2 acre without a permit from the state to do so. Under the circumstances the statutes expressly allow the posting of their withdrawal works and the issuance of an order commanding them to cease illegal withdrawals. RCW 90.03.070; RCW 43.27A.190.

Accordingly, we conclude that the Notice of Regulation in question here was properly issued.

IV.

Both the Board and the DOE recognize the hardship to the Morrises of having to reduce their irrigated acreage. However, it must be born in mind that they are not alone among applicants for use of the limited water resource in their area. Indeed, they are somewhere in the middle of the line of those asking for new appropriations. No reason is apparent for advancing them ahead of others. No justification is shown for allowing them to irrigate without a permit while others are waiting for permission to start.

V.

The Morrises position is that they relied on advice from a DOE employee in 1976 that they did not need a permit for what was then already irrigation exceeding the statutory exemption. Given the experience of the employee and the clarity and simplicity of the law on this point, we think it unlikely that such advice was given.

But, even if it was given, the Morrises were explicity disabused of any such notion by DOE in early 1985. Thereafter, any reliance on a 1976 conversation to justify irrigation in excess of the statutory exception was manifestly unreasonable.

Thus, we conclude that the Morrises have shown no valid defense for their 1987 irrigation in excess of 1/2 acre when the Notice of Regulation was made.

VI.

Any Finding of Fact which is deemed a Conclusion of Law is adopted as such.

From these Conclusions, the board enters this

ORDER

The Notice of State Regulation issued by DOE to David T. Morris on June 23, 1987, is affirmed.

DONE at Lacey, Washington this 23rd day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

11/23/87

LAWRENCE J. FAULK, Member

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

SAVAGE ENTERPRISES, INC. Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AUTHORITY, Respondent.	PCHB No. 87-176 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE MATTER, the appeal of a civil penalty of $250, for alleged violation of regulations regarding the removal of asbestos materials, came on for hearing before the Board, Wick Dufford, presiding, on April 18, 1988, in Lacey, Washington. Board member Judith A. Bendor has reviewed the record. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

At hearing appellant was represented by Douglas W. Elston, Attorney at Law. Respondent was represented by its attorney, Keith McGoffin. The proceedings were reported by Gene Barker and Associates.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Savage Enterprises is an asbestos removal contractor.

II

Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a municipal corporation empowered to carry out a multi-county program of

air pollution prevention and control. The agency's geographic jurisdiction includes the site of the incidents at issue. The Board takes notice of the provisions of PSAPCA's Regulation I.

III

In January, 1987, pursuant to notices of intent pre-filed with PSAPCA, Savage performed asbestos removal in the old Cogswell-Meath building in downtown Tacoma. The structure had been unoccupied for some time and was in an advanced state of disrepair. The roof had fallen in; the windows were broken; a large amount of asbestos insulation remained on pipes and ceilings.

The asbestos removal was carried out preparatory to the building's being demolished.

IV

During the course of the job, PSAPCA's inspector visited the site on numerous occasions to check on the on-going operations of Savage's workers. No infractions of the agency's rules were observed during these pre-completion visits.

On January 28, 1987, by prior arrangement with Savage's on-site foreman, PSAPCA's inspector arrived at the site to make a routine final compliance inspection of the completed project. It was understood by the inspector and confirmed by the foreman that the asbestos removal work at the site had been finished. The foreman accompanied the inspector in looking over the areas where Savage employees had worked.

V

In the course of the inspection, on the mezzanine level, the inspector observed a metal pipe from which Savage's workers had removed asbestos insulation. Running parallel to this pipe was a plastic pipe which had not been insulated.

On the plastic pipe the inspector found a dry, friable chunk of what appeared to be asbestos insulation. He also observed similar pieces of dry, friable material left on the metal pipe and on the floor beneath it.

The inspector took the chunk of material (slightly larger than a quarter dollar) from the plastic pipe to use as a sample, and took two photographs to document his observations.

VI

Savage's foreman, on being shown the materials on and below the pipe, took immediate steps to clean it up. The inspector looked on as workers began to prepare the area for removal of the residual debris.

Because the materials were found in the immediate vicinity of an area where Savage had performed work, and absent any evidence of intervening activity at that location, we find that the asbestos fragments were where they were as a result of the acts or omissions of Savage.

VII

The sample taken by PSAPCA's inspector was forwarded to the state Department of Ecology's laboratory in Manchester, Washington, using

appropriate chain of custody procedures.

Analysis performed at the laboratory showed the sample to contain 60 percent crysotile and 20 percent amosite asbestos.

The Board takes notice that polarized light microscopy used at the Manchester lab is a recognized technique for analyzing the asbestos content of samples and that the estimates of asbestos content derived therefrom are generally regarded as accurate in the scientific community. (See Appendix A, Subpart F, 40 CFR Part 763 -- Interim Method of the Determination of Asbestos in Bulk Insulation Samples.)

VIII

On February 20, 1987, PSAPCA mailed to Savage a Notice of Violation (No. 021849), relating to the observations made on January 28, 1987. This notice cited violations of PSAPCA's Regulation I, Sections 10.04(b)(2)(iii)(A) and (B). Under description of violation the notice stated:

> Causing or allowing asbestos materials that have been removed or stripped NOT to be:
> (A) Adequately wetted to ensure that they remain wet until collected for disposal;
> (B) Collected for disposal at the end of the working day.

The notice gave the location of the violation as 1346 Pacific Avenue, Tacoma, Washington, which is the correct address of the Cogswell-Meath building. The notice also indicated that WAC 173-400-075 had been violated.

IX

On June 22, 1987, the agency mailed to Savage a Notice and Order of Civil Penalty (No. 6707), assessing a fine of $250 and describing violations as follows:

> On or about the 28th day of January, 1987, in Pierce County, State of Washington, you violated WAC 173-400-075 and Article 10 of Regulation I by unlawfully causing or allowing the removal or encapsulation of asbestos materials at 1346 Pacific Avenue, Tacoma, Washington, and failing to comply with the following sections of Article 10 of Regulation I:
>
> 1. Section 10.04(b)(2)(iii)(A) of Regulation I: Failure to adequately wet the asbestos-containing materials and to ensure that they remain wet until collected for disposal -- Notice of Violation No. 021840.
>
> 2. Section 10.04(b)(2)(iii)(B) of Regulation I: Failure to collect the asbestos-containing material for disposal at the end of each working day -- Notice of Violation No. 021849.

The description of the acts or omissions constituting the infractions is an accurate paraphrasing language of the reference sections of Regulation I.

X

On July 20, 1987, Savage filed its appeal of the civil penalty with this Board. The case was assigned our cause number PCHB 87-176.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter. Chapters 43.21B RCW and 70.94 RCW.

II

In RCW 70.94.431, the Washington Clean Air Act provides for the assessment by air pollution control authorities of civil penalties for violation of the Act or of regulations implementing it. The penalty shall be "in an amount not to exceed one thousand dollars per day for each violation," and each violation is considered a separate and distinct offense.

The penalty is to be imposed by a notice in writing "describing the violation with reasonable particularity."

III

Savage argues that the penalty here should be dismissed because the violations were not described "with reasonable particularity."

As to the asserted violation of WAC 173-400-075, we agree. That section is a part of the general state regulation for air pollution sources and, as to asbestos, relates that the state incorporates as its regulations certain referenced federal regulations. The notice provided by PSAPCA gives no indication whatsoever of the particulars within these interconnected references which Savage is accused of failing to meet. We conclude that the notice must at least recite the specific regulatory requirement asserted to be violated.

However, we point out that the threshold of "reasonable particularity" is not a high one. These are civil wrongs, not criminal offenses. What is required is enough specificity to provide notice of the general nature of the purported violations. The full range of discovery normally available in civil litigation is available to parties in these proceedings. WAC 371-08-031. It is not difficult to obtain a more definite statement of the nature of a violation and related acts or omissions in order to be able to prepare a proper defense.

Accordingly, under the facts, we conclude that the description of the asserted violations of Regulation I in PSAPCA's notices meet the "reasonable particularity" standard.

IV

Savage suggests PSAPCA has not shown that the material found by the inspector was asbestos material. "Asbestos Material" as defined in January, 1987, was material containing more than 1% asbestos by weight. Regulation I, Section 10.02 was amended on January 14, 1988, to contain the following definition:

> (e) "Asbestos Material" means any material containing at least one percent (1%) asbestos as determined by polarized light microscopy using the Interum Method of the Determination of Asbestos in Bulk Insulation Samples contained in Appendix A of Subpart F in 40 CFR Part 763, unless it can be demonstrated that the material does not release asbestos fibers when broken, crumbled, pulverized or otherwise disturbed."

Savage made no demonstration that the material was not friable.

In an earlier case involving the same litigants, we determined that the volumetric percentage of asbestos determined by the method referenced in the above definition converts to essentially the same percentage measured by weight. Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-164 (March 28, 1988). Nothing was shown here which would call that determination into question.

V

Savage contends that the violations asserted were not proven by PSAPCA because the inspector was not on hand to observe the procedures followed by the workers while they were performing the removal.

The violations of Section 10.04 cited relate to two distinct procedures to be followed before the job is completed. First, asbestos materials that have been removed or stripped must be adequately wetted to ensure they remain wet until "collected for disposal." The latter is a defined term meaning "sealed in a leak-tight, labelled container while wet." Section 10.02(i). Second, the wet materials must be bagged and sealed at the end of each working day.

Here we have found that the asbestos materials discovered on site by the inspector were there as a result of the acts or omissions of Savage. The job had been completed when the inspector made his obserations. As to the materials found, the necessary inference is,

therefore, that Savage's workers had not followed the proper procedure of wetting and bagging while the job was in progress.

VI

Savage argues that PSAPCA lacks the statutory authority to promulgate or enforce regulations for the removal of asbestos inside a building. The company's position on this issue was rejected in our decision in Savage Enterprises, Inc. v. PSAPCA, PCHB 87-164 (March 28, 1988). We adhere to our decision and reasoning in that case.

In addition, we note that PSAPCA's asbestos regulations are part of a larger regulatory scheme. Asbestos is among the extremely dangerous substances which are the subject of National Emission Standards for Hazardous Air Pollutants (NESHAPS) promulgated by the United States Environmental Protection Agency (EPA) pursuant to the federal Clean Air Act.

The federal standards consist of work practices, similar to those in PSAPCA's Regulation I, Article 10, and are applicable indoors as well as out. 40 CFR 140 et sec. The federal Clean Air Act specifically authorizes such requirements. 42 USC 7412 (e)(1).

The state Clean Air Act is intended to comply with the requirements of the federal Act. RCW 70.94.011, 70.94.510, 70.94.785. The intergovernmental scheme is one of comparable or greater stringency as one progresses from the federal to the state to the local level. 42 USC 7416; RCW 70.94.331.

On the basis of this legal structure, EPA has delegated to the

State of Washington the conduct of the federal NESHAPS program for asbestos. 40 CFR 61.04(b)(WW). The state Department of Ecology has accepted this delegation through the adoption of WAC 173-400-075. PSAPCA is carrying out the program in its region through its own regulations which are equal to or more stringent than the federal-state regulations.

Regulations adopted pursuant to state law are valid if they are reasonably consistent with the statute they are intended to implement. Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). PSAPCA's powers include adopting rules consistent with the purposes of the state Clean Air Act. RCW 70.94.141. Because one of the purposes of the state Act is to comply with the federal Act, PSAPCA's asbestos rules, which effect such compliance, are within the authority granted under state law.

VII

Savage maintains that they cannot be penalized for asbestos left on a pipe because the regulations cited deal with asbestos removal. They argue that PSAPCA is improperly entering the area of contract enforcement.

In the instant case, the facts are that some of the asbestos found by the inspector had been removed. However, even as to the asbestos left on the previously insulated pipe, we believe the cited regulatory sections apply.

The evidence shows that Savage's announced intention was to

remove asbestos before demolition of the building. Except under exceptional circumstances not demonstrated here, demolition may not occur until all asbestos is removed. Regulation I, Section 10.04(a). Where removal is contemplated, we conclude that any asbestos left behind in a dry, friable state constitutes a violation of the wetting and bagging requirements of the rules. While the introductory words to Section 10.04(b)(2)(iii) speak to "asbestos materials that have been removed or stripped," we believe it an appropriate gloss on the regulations, under the instant facts, to apply them to materials missed in the removal and stripping process. Otherwise the purpose of preventing the release of asbestos fibers during demolition might be frustrated without regulatory sanction.

VIII

Based on the facts we have found, we conclude that Savage on the date in question violated Regulation I, Sections 10.04(b)(2)(iii)(A) and (B).

No contention was made that the amount of penalty assessed is excessive. We note that the $250 fine is substantially below the statutory maximum of $1000 per violation.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

ORDER

Notice and Order of Civil Penalty No. 6707 is AFFIRMED.

Done this 24th day of January, 1989.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

INDUSTRIAL MAINTENANCE and CONSTRUCTION, INC. Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-179 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case involves Industrial Maintenance and Construction, Inc.'s ("Industrial") appeal of Puget Sound Air Pollution Control Agency's issuance of Notice and Order of Civil Penalty (No. 6708; $1,000) for alleged violations of asbestos handling regulations.

A formal hearing was held on September 9, 1988 in Seattle, Washington. Board Members present were Judith A. Bendor (Presiding) and Wick Dufford (Chairman). Appellant Industrial was represented by Lawrence J. Fulton, Asbestos Project Manager. Respondent PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin and McGoffin.

Court Reporter Pamela J. Brophy of Gene Barker & Associates recorded the proceedings. Sworn testimony was heard. Exhibits were admitted and examined. Argument was made. From the foregoing, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency ("PSAPCA") is an activated air pollution control authority under the terms of the State of Washington Clean Air Act, responsible for monitoring and enforcing emission standards for hazardous air pollutants, including work practices for asbestos. PSAPCA has filed with the Board certified copies of its Regulation I (including all amendments thereto).

The Board takes official notice of the Regulation (as amended).

II

Industrial is a company located in Mt. Vernon, Washington which does asbestos removal work. It was hired to remove asbestos from the Jehovah's Witness Church in Stanwood, Washington, Snohomish County. This was Industrial's first asbestos removal project in a place within PSAPCA's jurisdiction.

III

The PSAPCA Notice and Order of Civil Penalty alleges that Industrial violated WAC 173-400-075 and Regulation I on or about

February 5, 1987, by:

1. Failure to contain removed or stripped asbestos in a controlled area at all times until transported for disposal. Section 10.04(b)(2)(iii)(c).

2. Failure to treat all asbestos-containing waste material with water, and after wet, seal in leak-tight containers, while wet. Section 10.05(b)(1)(iv).

A $1,000 fine was assessed.

IV

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous air pollutants (NESHAPS). It is a substance which by Federal Clean Air Act definition:

> causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness. Section 112.

Central Industries, Inc. v. PSAPCA, PCHB No. 87-88 (August 30, 1988), citing Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-164 (March 28, 1988) and Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18, 1987).

V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1).

PSAPCA has adopted its own regulations on removal of asbestos; they are designed to meet or exceed the requirements of the federal and state regulations. PSAPCA Regulation I, Article 10.

VI

In the fall of 1986, the Jehovah's Witness Church, located at 27127-56th Avenue NW, in Stanwood, Washington, burned and suffered extensive damage. Industrial was hired to remove asbestos from the damaged building, including that found in the ceiling and the roofing felt. On behalf of Industrial, Lawrence J. Fulton filed with PSAPCA a Notice of Intent to Remove asbestos from the 4,000 square foot building. Mr. Fulton is a certified asbestos worker licensed in the State of Washington and was in charge of the project.

VII

The removal began on Monday, February 2, 1987. There was debris from the fire on the ground. Industrial began by removing the larger asbestos pieces first. Then Industrial cleaned up the north side of the church where the roof and eaves had fallen in. Shakes and shingles were removed from the roof. The felt, which was made of asbestos, was removed from the roof and sealed while wet in double bags. Asbestos-containing bags were left overnight (February 4 to February 5, 1987) on the church roof and on the ground outside.

A yellow asbestos warning tape was strung around the church and all bags were behind this tape. On February 5, 1988, however, the

tape was in places lying on the ground, and in other places debris was on top of the tape. There were asbestos warning signs posted in several locations. A driveway right next to the church was used by church members during the removal to access a pump house.

Industrial's efforts to clean up the south side of the church, including removing the shakes and shingles and some of the felt from the roof, was in progress on February 5, 1988. On that day the area was very wet, there having been heavy rains.

VIII

At approximately 11:30 a.m. on February 5, 1987, an inspector with PSAPCA arrived at at the church. He observed the bags containing asbestos on the church roof and on the ground. He took several photographs. He took a sample from material from the bases of chairs that were outside. A subsequent test demonstrated that this material was not asbestos.

He also took a sample from an approximately 7" by 8" piece of roofing felt found among burnt debris on the south side of the building. The felt was very wet at the time. Subsequent tests revealed the material to be asbestos, 70% chrysotile.

IX

Based on the inspection and tests, Notices of Violation (Nos. 021513 and 021514) were issued, and the Notice and Order of Civil Penalty (No. 6708) was issued on June 22, 1987.

Industrial filed its appeal in a timely manner. (Board Order Denying Motion to Dismiss, August 11, 1987; confirmed on other grounds by Superior Court for Thurston County, Cause No. 87-2-01691-6, April 19, 1988.)

X

On February 5, 1987, after being informed of the possible violations, Industrial had the asbestos bags placed inside the building, and the bags were disposed of the next day at an authorized dumpsite.

XI

Under all the facts and circumstances, we are not persuaded that the existence of the asbestos felt in the time and place found on February 5, 1987, is attributable to any act of Industrial. Moreover, Industrial was still in the process of removing asbestos . The asbestos felt piece taken as a sample was wet at the time. Therefore, under all the facts and circumstances we are not persuaded that Industrial had engaged in any cognizable omission as regards the wetting and bagging of asbestos.

XII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the

parties. Chapter 43.21B RCW. The case arises under PSAPCA Regulation I, Section 10, implementing the Washington Clean Air Act, Chapter 70.94 RCW.

PSAPCA has the burden of proof.

II

Regulation I, Section 10 provides for liability on a strict basis; negligence need not be found. This strict liability standard supports the goal of preventing harm, because asbestos is a hazardous material which may reasonably be anticipated to cause serious irreversible illness. (See Finding of Fact IV, infra.)

Any diligence undertaken by appellant is weighed against the amount of the fine, rather than negating basic liability.

III

We conclude that PSAPCA has not proven Industrial violated Regulation I, Section 10.05(b)(1)(iv). (See Finding of Fact XI above.)

IV

We conclude that Regulation I, Section 10.040(b)(2)(iii)(c) was violated when the asbestos-containing bags were left overnight outside. "Controlled area" is defined as "an area to which only certified asbestos workers or other authorized personnel have access." Section 10.02(j). Here access was by simply walking or driving to the church where the bags were outside. The bags were not in a "controlled area".

V

The purpose of civil penalties is to promote future compliance with the law, both by these parties and the public at large. Central Industries, supra. The reasonableness of penalties is based upon several factors, including the scope of the violation and appellant's conduct.

We conclude that Industrial's lack of prior violations of PSAPCA regulations and its subsequent efforts to contain the asbestos bags in a controlled area merit reduction of the penalty.

VI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The Notice and Order of Civil Penalty as to the violations of Regulation I, Section 10.05(b)(1)(iv) is REVERSED, and as to Section 10.04(b)(2)(iii)(c) is AFFIRMED.

The $1,000 penalty is REDUCED to $750. In addition, $400 of the remaining penalty is SUSPENDED on condition that Industrial does not violate air pollution laws for two years from the date of this Order.

DONE this 13th day of October, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman